United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1212

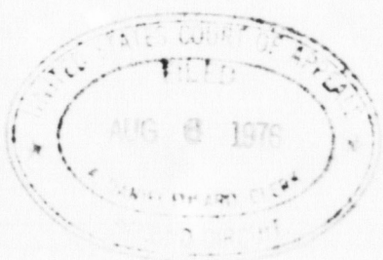
B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ARMANDO ESPARZA, DELFIN "LEO" GONZALEZ, HECTOR CHRISTIAN, Appellant.	Docket No. 76-1212

BRIEF FOR APPELLANT GONZALEZ

ON APPEAL FROM A JUDGEMENT OF CONVICTION
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENCER SERVICE UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ARMANDO ESPARZA, DELFIN "LEO" GONZALEZ, HECTOR CHRISTIAN, Appellant.	Docket No. 76-1212

BRIEF FOR APPELLANT GONZALEZ

ON APPEAL FROM A JUDGEMENT OF CONVICTION
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether appellant Gonzalez's conviction under Count Two merged with his conviction under Count Three?

STATEMENT PURSUANT TO RULE 28 (a) (3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered on May 14, 1976, convicting appellant Gonzalez of conspiracy to distribute cocaine in violation of 21 U.S.C. §841 (a) (1) and 846, (count one); possession with intent to distribute 115 grams of cocaine on May 29, 1975, in violation of 21 U.S.C. §821 (a) (1) (count two); and distribution of 115 grams of cocaine on May 29, 1975 in violation of 21 U.S.C. §841 (a) (1) (count three). Appellant Gonzalez was sentenced to twelve years incarceration and three years special parole on each count, sentences to run concurrently. The Federal Defender Services Unit of the Legal Aid Society was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Gonzalez was indicted, along with Armando Esparza and Hector Christian on October 21, 1975 for conspiracy to distribute cocaine (count one). Gonzalez and Esparza were also indicted for possession with intent to distribute 115 grams of cocaine on May 29, 1975 (count two) and distribution of the same cocaine on the same date (count three). [fn1]

---

fn1: The first trial in this case commenced on January 19,1975, When the jury was unable to reach a verdict, the court declared a mistrial.

The second trial, which is the basis for the present appeal, commenced on February 23,1976.

A. The Government's Case

The government's principal witness was Louis Rodriguez, who had participated in the initial stages of the conspiracy alleged in count one, but who was arrested and became an informant for the government prior to the May 29, 1975 transaction which provided the basis for the substantive charges in counts two and three.

According to Rodriguez and the other government witnesses, the events relevant to the crimes charged commenced on April 21,1975 when Rodriguez introduced defendant Hector Christian to Nicholas Alleva at the Roaring Twenties Bar in Brooklyn for the purpose of arranging for Alleva to purchase some cocaine. (34,212)[fn2] At this meeting, Christian assured Alleva that his connections could provide large quantities of pure quality cocaine. (38,214). Unbeknownst to Christian and Rodriguez, Alleva was an undercover agent.

Thereafter, on May 15, 1975, Christian phoned Rodriguez, explaining that he had some cocaine for sale (38). Rodriguez thereupon contacted Alleva and arranged for a meeting the following evening, May 16th, at the Tollgate Bar in Brooklyn, at which time Alleva was to purchase one-eight kilogram of cocaine. (40,216).

On the evening of May 16, 1975, Rodriguez met with Christian at Tinita's Bar, where Christian assured him that the

---

fn2: Numbers in parenthesis refer to pages of the trial transcript.

deal would go through that evening. Then while Christian remained at Tinita's, Rodriguez proceeded to the Tollgate Bar, where he met Alleva.

With Alleva was another individual, whom Alleva introduced as his nephew, but who was in reality another undercover officer, Agent Cavuto. (42-3).

After waiting for some time, Rodriguez received a phone call from Christian, advising him that the cocaine had not yet arrived at the Tinita Bar. After some further delay, Rodriguez, Alleva, and Cavuto decided to proceed to Tinita's.(43-4,218). Arriving there, they met Christian, who advised them that although his people had not yet arrived with the drugs, they were on their way. (44).

Shortly thereafter, appellant Gonzalez arrived at Tinita's, and was introduced by Christian as the partner of his drug source. Gonzalez allegedly explained to the men that he did not have the drugs with him, but that they would be arriving shortly. (45,220).

When the person bringing the drugs failed to appear, Gonzalez and Christian left the bar in search of him. (212).

Unsuccessful, they returned to the bar, where Gonzalez gave Alleva a phone number where he could be reached. Rodriguez similarly gave Gonzalez his business card and the parties departed. (45,221-2).

According to Rodriguez, Gonzalez phoned him the following morning and arranged to bring over his cocaine connection to meet Rodriguez at Rodriguez's place of business that afternoon.

Gonzalez arrived with defendant Armando Esparza, who explained to Rodriguez that he was expecting a shipment of cocaine shortly and would sell some to Alleva. (47-8). Rodriguez thereupon gave Esparza his business card and telephone number. (48)

On May 22,1975, Rodriguez was arrested during an unrelated drug transaction, and agreed to cooperate with the DEA agents. (52, 226).

Thereafter, on May 27, 1975, defendant Esparza phoned Rodriguez, explaining that he had received a shipment of cocaine and that he was prepared to sell one-eighth kilogram to Alleva. Esparza allegedly told Rodriguez that he should work out the details of the transaction with appellant Gonzalez. (52-3).

According to Rodriguez, it was thereafter arranged that the transaction would take place at the Tollgate Bar on May 29, 1975. (53). Pursuant to those arrangements, Rodriguez met Gonzalez at the Tollgate on May 29th at approximately 9 pm. (53). Gonzalez, after learning from Rodriguez that Alleva had not yet arrived, departed, stating that he would return shortly. Thereafter, Alleva and Cavuto arrived and met Rodriguez. (55, 228).

Gonzalez returned to the bar a short time later. (55, 233). According to a surveillance agent stationed outside the bar, Gonzalez was dropped off by defendant Esparza, who then circled the block and parked in front of the bar, remaining in his car. (428).

When Gonazalez entered the bar, Rodriguez and Alleva told him to go with Cavuto to Gonzalez's car, which was parked near

the bar, and exchange the package there. (55, 138, 233). Inside Gonazalez's car, Gonzalez handed a package to Cavuto, who opened it and tested the contents, determining that it was cocaine. (429-30). According to Cavuto, Gonzalez informed him that the cocaine was 90-100% pure (385).

The two men thereupon returned to the bar, and Alleva proceeded with Gonzalez to Alleva's car. There, Alleva removed $5000 from the car and handed it to Gonzalez. (235). According to the surveillance agent, Gonzalez thereupon proceeded to Esparza's car, and departed. (434).

B. Appellant Gonzalez's Defense

Appellant Gonzalez testified in his own behalf. He explained that he was acquainted with Louis Rodriguez, the government informant, because they both belonged to the San Raphael Social Club. (537). On or about May 28,1975, Appellant Gonzalez had encountered Rodriguez at the El Torero Bar. (538). There, Rodriguez offered to pay Gonzalez $200 if he would go to the Tollgate Bar the following night and deliver a package to some of Rodriguez's friends. (538-9). Gonzalez, who was unemployed at the time and therefore in need of money, agreed to perform this task.(540,551). The following day, when Gonzalez arrived at the Tollgate, Rodriguez handed him a package.(539). When Alleva and Cavuto thereafter arrived, Gonzalez proceeded with Cavuto, at Rodriguez's instruction, to Gonzalez's car,

where he handed Cavuto the package. (542). A moment later, after Cavuto returned the package, they went back to the bar (544). Gonzalez then left the bar with Alleva and walked to Alleva's car, where Gonzalez exchanged the package for some money. (544). Gonzalez then drove in his car to the Torrero Bar, where he met Rodriguez. After handing Rodriguez the money he had received from Alleva, Gonzalez was paid the promised $200 (545). Gonzalez testified that he did not know that the package he had exchanged contained cocaine, and that he had had no conversations with the agents concerning drugs. (543, 551-2).

ARGUMENT

Point I

APPELLANT GONZALEZ'S CONVICTION UNDER COUNT TWO MERGES WITH HIS CONVICTION UNDER COUNT THREE.

Counts two and three of the indictment in the present proceeding were both based on a single transaction, involving the alleged sale of 115 grams of cocaine on May 29, 1975 to undercover agents. Count two charged that appellant Gonzalez, on May 29, 1975, possessed 115 grams of cocaine with the intent to distribute it, in violation of 21 U.S.C. §841(a) '1). Count three charged that appellant Gonzalez distributed the same 115 grams of cocaine on the same day, in violation of the same statutory provision.

It is established law that where the "gravamen" of two offenses are identical, the convictions of the defendant for those offenses merge. See eg. Prince v. United States, 352 U.S. 322, 329 (1957). As to the crimes charged in counts two and three of the present proceeding:

> The gravamen of each offense is the distribution of a controlled substance: When the intent is carried out by a success-

ful sale the offenses merge.[fn]

United States v. Curry,
512 F2d 1299, 1306 (4th Cir. 1975)

cf. United States v. Howard, 507 F2d 559, 563 (8th Cir. 1974) (merger of "possession" and "possession with intent to distribute" counts bases on a single transaction). Gonzalez's conviction on count two therefore merged with his conviction on count three. Consequently, the judgment of conviction and sentence for count two must be vacated, the concurrent sentences on the remaining two counts set aside, and the case remanded for a resentencing.

Although the sentence imposed on count two was concurrent with the sentences imposed for counts one and three, the sentence on the merged count must be set aside because of its potential impact on the defendant's parole elligibility. Clermont v. United States, 432 F2d 1215, 1217 (9th Cir. 1970) ; See also United States v. Gaddis, ___U.S.___ , 44U.S.L.W. 4293, 4294 fn. 12 (March 3, 1976); United States v. Mariani, slip op. 5045, 5046-7 (2d Cir. Doc. No. 76-1075, July 19,1976). Similarly, the conviction on the merged count must be vacated because of the detrimental collateral consequences of any improper felony conviction. Marshall v. United States, 436 F2d 155, 161 (D.C.

---

fn: In United States v. Curry, supra, as in the present prodeeding, the appellant had been convicted of one account of "possession with intent to distribute" a controlled substance and one count of "distribution" of a controlled substance, based on a single transaction.

Cir. 1970); See also United States v. Maze, 414 U.S. 395, 397,fnl (1974); Benton v. Maryland, 395 U.S. 784 (1969); cf. United States v. Morgan, 346 U.S. 502, 505 (1954); Carafas v. LaVallee, 391 U.S. 234, 237-238 (1968); Fiswick v. United States, 329 U.S. 211, 222 (1946); United States v. Travers, 514 F2d 1171, 1172 (2d Cir. 1974).

Finally, the concurrent sentences on the remaining counts should be set aside and the case remanded for a resentencing because of the possibility, in cases of merger, that conviction on the merged count improperly affected the sentences imposed on the remaining counts. See eg. United States v. Spears, 449 F2d 946 (D.C. Cir. 1971); United States v. Parker, 442 F2d 779, 780 (D.C. Cir. 1971); Marshall v. United States, 436 F2d 155 (D.C. Cir. 1970); Coleman v. United States, 420 F2d 616 (D.C. Cir. 1969); United States v. Parson, 452 F2d 1007 (9th Cir. 1971). fn

---

fn: As this Court held in United States ex rel. Weems v. Follette, 414 F2d 417, 419 (2d Cir. 1969), the Supreme Court's decision in Benton v. Maryland, supra, took much of the strength out of the concurrent sentence doctrine. In the aftermath of Benton, this Court has demonstrated a marked reluctance to apply the concurrent sentence doctrine. United States v. Mapp, 476 F2d 67, 82 (2d Cir. 1973); United States v. Brown, 479 F2d 1170, 1173, 1176 (2d Cir. 1973); United States v. Rivera, 521 F2d 125, 129 (2d Cir. 1975); Seiller v. United States, Slip Op. 6509, (2d Cir. Doc. No.75-2002, December 1, 1975) see also the judgment of this Court in United States v. Brown, 75-1307 (2d Cir. November 21,1975).

Point II

APPELLANT GONZALEZ ADOPTS ALL ARGUMENTS OF CO-APPELLANTS THAT WOULD BE APPLICABLE TO HIM.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF CONVICTION AND SENTENCE ON COUNT II SHOULD BE VACATED, THE SENTENCES ON THE REMAINING COUNTS SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED FOR RESENTENCING.

Respectfully Sumitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MICHAEL HALSEY BROWN
FEDERAL DEFENDER SERVICE UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,

of Counsel.

August 6, 1976

CERTIFICATE OF SERVICE

Aug 6, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Michael D. Young